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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-~~1212~~ 1216

CHARLES BAKER, *et al.*,

Petitioners,

—against—

F & F INVESTMENT, *et al.*,

Respondents.

BRIEF OF RESPONDENT ALFRED BALK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 1972

Docket No. 72-1212

Charles Baker, *et al.*,

Petitioners,

—against—

F & F Investment, *et al.*,

Respondents.

BRIEF OF RESPONDENT ALFRED BALK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Alfred Balk, who is a non-party witness in this action, respectfully submits that this Court should deny the petition by the plaintiffs for a writ of certiorari to the United States Court of Appeals for the Second Circuit for the following reasons:

1.

No important question of federal law requiring this Court's attention is presented.

The basic issues presented in these proceedings are: (a) whether a District Judge has the right in his discretion to control and administer discovery in a civil action pending before him; and (b) whether the District Judge at bar committed a clear abuse of that discretion.

The Court of Appeals correctly held, 470 F.2d 778, that: (a) the discovery order of the District Judge, 339 F. Supp. 942, was properly a discretionary order; and (b) the District Judge had not abused his discretion in entering the order. Indeed, were it not for the unusual circumstance that the order involved a deposition which was being conducted in a district other than the trial forum of the action (because Mr. Balk had moved to New York from Chicago), the order would not have been appealable at all. See e.g., *Republic Gear Company* v. *Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). Cf. *Alexander* v. *United States*, 201 U.S. 117 (1906).

In their zeal for review, petitioners have incorrectly stated (Petition, p. 6) what the Courts below held. Both decisions were based upon and directed toward the particular facts of "this case," not a sweeping overview of the First Amendment or of journalists' rights under it or of any rigid distinction between discovery of the matters here involved in civil as opposed to criminal litigation.

2.

The Court's denial of the discovery sought by petitioners was properly premised upon, and is also justifiable upon, non-constitutional grounds.

A party's right to discovery and disclosure is not absolute, especially in the case of non-party witnesses such as Mr. Balk. In many cases not involving a claim of privilege or constitutional right of silence, where the particular facts have shown good cause, witnesses have been permitted to refuse to answer questions on the ground that the witness deemed the information personally confidential. See, e.g., *Titus* v. *Rorick*, 167 F.2d 571, 581 (6th Cir. 1948); *Reed* v. *Smith Barney & Co.*, 50 F.R.D. 128, 130 (S.D.N.Y. 1970); *National Utility Service* v. *Wisconsin Centrifugal Foundry*, 44 F.R.D. 539, 540 (E.D. Wisc. 1968); *De Long Corporation* v. *Lucas*, 138 F. Supp. 805, 809 (S.D.N.Y. 1956) (Kaufman, J.); *Shawmut Inc.* v. *American Viscose Corp.*, 11 F.R.D. 562, 566 (S.D.N.Y. 1951).

The District Judge, upon weighing all of the competing interests involved on the particular facts of "this case," reasonably concluded that the balance tipped decidedly in Mr. Balk's favor. The Court of Appeals agreed.

Indisputably Mr. Balk is not a party, and was not seeking to aid the respondents whose allegedly unlawful conduct he had uncovered and disclosed to the public in his article. Rather Mr. Balk had voluntarily testified at length in support of petitioners' case. Mr. Balk might possibly be sued for indemnity if, after revealing his source, the source were held liable, since Mr. Balk had contracted in writing not to reveal the source as a condition precedent of obtaining the article.

To subject Mr. Balk to potential liability would present an inexplicable anomaly of justice: indisputably Mr. Balk did not participate in or assist in the alleged wrongs and obtained no financial benefit or gain from them; rather he had exposed that wrongdoing so as to pave the way for public and private action, such as this very litigation, to end blockbusting.

Petitioners failed to make any showing (and indeed did not even attempt to show) that the information sought could not be obtained by them elsewhere. The alleged proceedings detailed at p. 4 of the Petition are not part of the Record below, were never mentioned below and indeed appear to be contradicted by the record and findings below. There was no claim or showing in either of the Courts below of any effort to ascertain the same information sought from Mr. Balk from any other source. There is still no claim that any of the possible "leads" referred to by the District Judge were explored by petitioners. Petitioners still have made no showing of ever having asked any of the party defendants in pretrial discovery whether he was Mr. Balk's source.

Likewise, the information sought from Mr. Balk does not "go to the heart" of petitioner's case, but rather deals with, at most, the identity of only one of a large number of defendants and none of the ultimate issues in the case. Significantly, Mr. Balk has never seen a list of the defendants in this action and, thus, does not even know if the source is one of them.

3.

The decision below is not in conflict with this Court's holding in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

The decision of the Court of Appeals did not challenge the holding in *Branzburg* v. *Hayes;* both Courts below merely distinguished the *Branzburg (Caldwell)* decisions on the facts presented. The Court of Appeals at bar did not create a "journalist's privilege"; rather it specifically noted that this Court in *Branzburg* had ruled that "federal law does not recognize an absolute or conditional journalist's testimonial 'privilege'" (see p. 781 of 470 F.2d). Its statements regarding the issues presented in *Branzburg* are entirely consistent with this Court's opinion there, which stated (at p. 682 of 408 U.S.) that "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas . . ."

Likewise, there is no "conflict among the Circuits" or other conflict of the law involved at bar to warrant the attention of this Court. This Court itself recognized in *Branzburg* that there might be cases where disclosure of a journalist's source might not be appropriate. Mr. Justice White expressly stated that (at p. 691 of 408 U.S.):

> "[our] conclusion itself . . . does [not] threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issue of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.

> Nothing before us indicates that a large number or percentage of *all* confidential news sources fall into either category and would in any way be deterred by our holding . . . ." (Emphasis the Court's).

And Mr. Justice Powell, in his concurrence in *Branzburg*, also emphasized (at pp. 709-10 of 408 U.S.):

> "I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen . . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . . *Indeed, if the newsman* is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he *has* some other *reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered.*" (Emphasis supplied.)

The decisions below comport with both of these statements. They do not, as petitioners allege (Petition, p. 7), "create an absolute journalist's privilege in civil cases," nor do they purport to. Rather, they merely ruled that, on the facts presented, the demanded disclosure was not shown to be warranted. Thus, the Court of Appeals specifically and consistently referred in its opinion to "this case" and ruled on the basis of the facts presented in "this case."

4.

No gap has been created in civil as opposed to criminal cases on the question of compelling journalists to reveal their sources.

In *Garland* v. *Torre,* 259 F.2d 545 (2d Cir. 1958) (opinion by Mr. Justice Stewart) cert. den. 358 U.S. 910 (1958), on the basis of the facts there presented, the same United States Court of Appeals for the Second Circuit did order a newswoman in a civil case to reveal her allegedly confidential source for portions of an article she had written. Although *Garland* was cited, apparently with approval, in this Court's opinion in *Branzburg* (see p. 686 of 408 U.S.) and was discussed at length in both opinions below (see pp. 783-84 of 470 F.2d and pp. 943-45 of 339 F. Supp.), petitioners at bar fail to cite it in their petition to this Court.

The Courts below properly distinguished *Garland* on its facts; they did not seek to overrule *Garland.* Both cases (*Garland* and the instant case) thus stand on the books in support of and as proof of the principle that each civil case will be decided on the basis of its own particular facts—as is true with regard to discovery rulings having nothing to do with alleged "privileges." In short, the Court of Appeals did not purport to and did not actually establish "an absolute journalist's privilege in civil cases," as petitioners mistakenly argue (Petition, p. 7).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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